DOCUMENT RESUME

ED 340 941 CE 060 210

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TITLE The Oncology of Discrimination and the Disparate Impact Therapy: Title VII and Upper Level Professional and Managerial Jobs.
PUB DATE 10 Oct 91
NOTE 34p.; Paper presented at the Annual Conference of the Council on Employee Responsibilities and Rights (Virginia Beach, VA, October 10, 1991).
PUB TYPE Speeches/Conference Papers (150) -- Reports - Research/Technical (143)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Adults; Affirmative Action; *Civil Rights Legislation; Court Litigation; Employed Women; *Equal Opportunities (Jobs); Equal Protection; *Federal Legislation; *Managerial Occupations; Minority Groups; Personnel Selection; *Professional Occupations; *Racial Discrimination; Sex Discrimination; Social Bias
IDENTIFIERS *Civil Rights Act 1964 Title VII; Disparate Impact Theory

ABSTRACT

An examination was made of the evidentiary problems that exist in using a disparate impact theory to challenge the subjective criteria many organizations use to hire, promote, or dismiss upper-level professional and managerial employees. Although subjective criteria occur at all levels of employment, they are especially prevalent when dealing with upper-level jobs. Thus, subtle race and gender-based discrimination is harder to prove. At stake are the interests of employees who want the freedom to aspire to upper-level professional and managerial jobs without race or gender barriers, employers who want to make efficient decisions, and society, which has an interest in providing equal access to economic institutions. Title VII of the 1964 Civil Rights Act is the legislation used to combat workplace discrimination. However, applying this law to the less-blatant types of workplace discrimination has been extremely difficult. The Supreme Court has considered many cases alleging disparate treatment. Court decisions based on these suits held that employment tests had to be job related, but were vague with regard to whether disparate impact analysis could be applied to subjective decisions under workable evidentiary standards. Since job criteria for upper-level positions are vague and constantly changing, Title VII is not equipped to cure racial and gender discrimination in the work force of the 1990s and beyond. (One hundred twenty-one text notes, most citing court cases, are included.) (KC)

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THE ONCOLOGY OF DISCRIMINATION AND THE DISPARATE IMPACT THERAPY: TITLE VII AND UPPER LEVEL PROFESSIONAL AND MANAGERIAL JOBS

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Presented at the 1991 Annual Conference of the Council on Employee Responsibilities and Rights. October 10th, 1991. Virginia Beach, Virginia USA.

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I. Introduction

In drafting of the Civil Rights Act of 1964, 1/ Congress attempted to fashion a statutory knife which would reach into modern private economic organizations and eviscerate racial and gender based discrimination. 2/ While some of the disease has been removed, troubling symptoms still remain. 3/ Should more surgery be done to remove less obvious racial and gender based discrimination, or will such surgery create severe complications? Perhaps the more important question now becomes, after 27 years, is a new therapy needed?

This paper examines the evidentiary problems in using a disparate impact theory to challenge the subjective criteria many organizations use to hire, promote, or dismiss upper level professional and managerial employees. Although subjective criteria occur at all levels of employment, they are especially prevalent when dealing with these upper level jobs. 4/ This paper will first look at the interests at stake in the use of subjective criteria, review how the courts have used disparate impact analysis to tackle the problem, and then critically analyze the usefulness of Title VII in curbing racial and gender based discrimination in professional and managerial jobs. Undergirding Title VII is the assumption that organizations work as rational meritocracies. That assumption will be critically examined.

The Supreme Court in recent terms has decided major cases which bear directly on the evidentiary problems associated with disparate impact analysis and subjective employment criteria -- Watson v. Fort Worth Bank & Trust, 5/ and Wards Cove Packing Co. v. Atonio. 6/ Special attention will be paid to these two important, yet controversial

decisions.

II. The Interests at Stake

One of the major themes of United States legal history in the 20th Century has been the proliferation of social legislation focused on the work place. 7/ Fueled by the industrial revolution and now the information revolution, the organizational work place has taken an important, if not the central focus, in our economic and social fabric. 8/ For most Americans, organizational values now define not only our economic well being but also our social place. 9/

It was therefore hardly surprising that when Congress sought to cut away racial and gender based discrimination, it turned to the work place. 10/ Through employment, Congress felt that it could not only address the income deprecation caused by discrimination, but could also assure that leadership in our major societal institutions would be open to those of merit. 11/

Title VII of the 1964 Civil Rights Act quickly emerged as an important instrument for treating the disease. A large and complicated body of law developed around Title VII actions. While the knife cut clean, if not always rapidly, through blatant policies of race and gender based discrimination, it cut less smoothly and much less thoroughly through less obvious and more subjective race and gender based discrimination. This paper will focus on this less obvious, subjective discrimination.

There are three major interests at stake when dealing with subjective employment criteria and possible race or gender based discrimination. Firstly, individual employees have an interest in enjoying the freedom to aspire to upper level professional and

managerial jobs without race or gender barriers. Secondly, employers have an interest in making employment decisions in the best interests of their organizations, efficiently and without the fear of costly litigation. Finally, society has an interest in providing equal access to its major economic institutions without regard to race or gender.

The Interest of Individual Employees

Individual employees have the interest of wanting to take on jobs of increasing professional or managerial responsibility. Such jobs usually offer professional challenge, social prominence, and better compensation. While not everyone aspires to such jobs, many do.

As racial minorities and women rise to higher levels of professional or managerial responsibility, they often perceive that they run into a "glass ceiling." 12/ The metaphor describes the elusive feeling that they cannot advance beyond a certain level because they are somehow being discriminated against. Since employment decisions about middle and upper level jobs are often based on subjective criteria, 13/ individual employees cannot easily tell whether these jobs are denied to them because they lack merit, because covert racism or sexism exists, 14/ or because white male decision makers making close or ambiguous decisions unconsciously embrace familiarity rather than diversity. It is not difficult to see how this feeling is reinforced if statistics show that few of their class rise to upper or top level professional or managerial jobs. 15/

The Interest of Employers

Employers have an interest in making employment decisions in an efficient

manner. When making decisions about upper level professional and managerial jobs, subjective measures are used more often than standardized tests or other objective measures. 16/ The demands of these jobs often change rapidly and are often not as clearly defined as lower level jobs which, at least theoretically, have much narrower and better defined performance standards. 17/

Employers have an interest in being free from having to make costly and time consuming predictive validity studies of each subjective job criterion. 18/ They also have an interest in avoiding costly legal challenges to their employment decisions. 19/ In short, employers fear focusing more energy on defensive personnel policies than on pursuing the economic goals of their organizations.

The Interests of Society

Finally, society has an interest in curbing racial and gender based discrimination in its major economic organizations. 20/ Underlying this interest is the Congressional intent to do away with race and gender based employment discrimination in a way which would embrace merit and avoid quotas. 21/ Obviously, this intent is based on the underlying assumption that economic organizations can and should be run as meritocracies and that individual job decisions, at any level, should not flow from racial or gender based discrimination but should flow from a desire to obtain the best job performance. 22/

II. The Struggle of the Courts to Resolve the Interests

The existence of racial and gender based discrimination in employment at the time of the enactment of Title VII was obvious to all with a social conscience, but the

question of whether to deal with it through legislation and if so, how to deal with it fueled enormous controversy. 23/ When Congress looked to employment as a way to remedy discrimination, it was pressing on raw political nerves. Not only did it make organizations nervous about the potential costs of compliance, but it also made the entrenched white majority nervous about losing their good jobs and income. Consequently, Title VII followed a rocky path to enactment leaving a legislative history clouded with last minute changes and floor amendments. 24/ It was left to the administrators of Title VII and the courts to interpret and shape the future of Title VII.

Two major types of actions are now used in pressing Title VII employment discrimination suits -- disparate treatment and disparate impact. Although this paper will focus on disparate impact analysis, a brief discussion of disparate treatment analysis will be a helpful contrast to the issues involved in disparate impact analysis.

The Supreme Court first distinguished disparate treatment from disparate impact in McDonnell Douglas Corp. v. Green. 25/ The Court distinguished between actions based on intentional employment discrimination and actions based on facially neutral practices which nevertheless are discriminatory in effect and act to create unnecessary barriers. 26/

Later, in Texas Department of Community Affairs v. Burdine, 27/ the Court clarified the evidentiary burdens in disparate treatment cases. Under Burdine standards, the plaintiff must first prove by a preponderance of evidence that there is intentional discrimination. If the plaintiff is successful, the defendant may then rebut this inference by producing some legitimate, nondiscriminatory reason for the decision. 28/ Note that

the burden is one of production in that the defendant need not convince the trier of fact by a preponderance of the evidence that the articulated reason was the actual reason for the decision. Finally, if the defendant has met the burden of production, then the plaintiff may prove, by a preponderance of evidence, that the defendant's articulated reason was a mere pretext for discrimination. 29/

In the classic disparate treatment action, the crucial stage is usually the third stage. 30/ Despite, generous discovery procedures, the plaintiff does not have an easy time proving pretext. "Because of the subjective nature of intent, the increasing Title VII sophistication of employers, and the defendant's exclusive knowledge of its own motives, the plaintiff's burden at this stage of the disparate treatment case is quite difficult." 31/

Griggs

In the 1971 Griggs v. Duke Power Co. case, the Supreme Court first laid down the foundation for disparate impact analysis. 32/ The case involved company which had restricted blacks exclusively to its labor department. When the company allowed blacks to apply for other jobs in 1965, it used two objective criteria. Firstly, it required a high school diploma -- a requirement of white non-labor department employees since 1955. 33/ Secondly, in 1965, it allowed blacks who did not have a high school diploma to qualify for transfer by scoring at or above the national median high school scores on the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Comprehension Test. 34/ Neither test "was directed or intended to measure the ability to learn to perform a particular job or

category of jobs" at Duke Power. 35/

Chief Justice Burger, writing for a unanimous Court, 36/ held that Title VII prohibited the criteria when neither standard was shown to be significantly related to successful job performance at Duke Power, when both qualifications in effect operated to disqualify blacks at a substantially higher rate than white applicants, and when the jobs in question had been formerly filled by only white employees as part of long standing segregation. 37/

Three things should be noted about the decision which, as we shall see, prove crucial in later decisions. Firstly, the Court was specifically concerned with past segregation. Justice Burger said that under Title VII, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 38/

Secondly, the Court stressed that there must be some relationship between the criteria and the job performance in order for practices, which perpetuate the status quo, to be permissible under the Act. The Court found that Title VII,

> proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited . . . . [N]either the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. 39/

Finally, the Court was careful to interpret the section 703 (h) testing provision of Title VII 40/ as not prohibiting a requirement that tests be job related. Justice Burger said, "From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of sec. 703 (h) to require that employment tests be job related comports with congressional intent." 41/

The Griggs Court did not lay out precise evidentiary standards. The Court's simultaneous use of the phrases "business necessity," "related to job performance," and "shown to bear a demonstrable relationship to successful performance," tended to obscure the question of what level of burdens of proof the plaintiff and the defendant bear in a Title VII action. The Court's phrase, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question" was also of little help. 42/

Albemarle

The Court took an opportunity to clarify the evidentiary burdens in Albemarle Paper Company v. Moody. 43/ The facts are remarkably similar to Griggs and involved past segregation followed by a requirement of a high school degree and certain scores on two standardized tests in order for minorities to enter other types of jobs. 44/

Justice Stewart, in writing the opinion of the Court, directly quoted Griggs. 45/ He ruled that the plaintiff must first make a prima facie case of discrimination, then that the defendant may rebut by proving that its tests are "job related," and finally that the plaintiff may show that the employer was using its tests only as a pretext for discrimination. 46/ The case centered around the issue of whether the paper company

had shown that its tests were job related. 47/

Justice Stewart turned to the EEOC Guidelines, largely based on the American Psychological Association's Standards for Educational and Psychological Tests, and found that even though these guidelines were not formal administrative regulations with the force of law, they were developed by the enforcing agency and should be given "great deference." 48/ Additionally, he found that the guidelines were consistent with the requirements in Griggs. 49/

Justice Steward found that the methods used by the paper company to establish the validity of the tests were seriously flawed for four reasons. Firstly, he found that only a few jobs were used in the study and that the other jobs were different enough that they should have had separate validation procedures. 50/ Secondly, even though the validation studies used actual supervisor observations of job performance as part of the study, the criteria for their observations were so vague and undefined that it was unclear whether the criteria reflected the legitimate interests of the company in job specific abilities. 51/ Thirdly, the studies unjustifiably applied attributes for top jobs which might be many years and several promotions away for entry level workers. When coupled with a history of past discrimination and white employees already in those jobs, overly high entry level standards were unjustified. 52/ Finally, tests on white workers already in the jobs should have taken into account the maturation effects associated with age and experience. 53/

It seems that the Albemarle case stands for the proposition that where past discrimination is at issue, job selection criteria must be professionally validated in

conformity with EEOC guidelines. Yet, Chief Justice Burger and Justice Blackmun, in separate opinions, warned against rigid adherence to only the EEOC guidelines. Chief Justice Burger argued that the Guidelines do not carry the force of law and that other types of proof such as the testimony of experts in the field of employment testing might be properly used. 54/ Justice Blackmun warned that wooden adherence to rigid EEOC Guidelines would force employers, overwhelmed by expensive validation studies and fearful of expensive litigation, to adopt quotas -- something far from the intent of Title VII. 55/

Watson

In the wake of the Court's decisions concerning disparate treatment and disparate impact, the lower courts were left to sort out two questions. Firstly, can disparate impact analysis apply to subjective employment practices as well as the now familiar psychometric tests and diploma requirements addressed in Griggs and Albemarle? 56/ Secondly, if disparate impact can be applied to subjective job criteria, what is the precise standard of proof that the plaintiff and the defendant must carry at each stage of the analysis?

The Supreme Court tackled the problems in Watson v. Fort Worth Bank & Trust. When Watson came before the Court the lower Courts were divided in terms of whether or not disparate impact analysis could be applied to subjective employment decisions. 57/ At the heart of the problem was the question of whether disparate impact analysis could be applied to subjective decisions under workable evidentiary standards. 58/

The basic opinion was written by Justice O'Connor and is somewhat unusual because part of the opinion was for the Court and part of the opinion was for a plurality of the Court. The opinion can be divided into two basic parts. 59/ In one part, Justice O'Connor, writing for the Court, held that disparate impact analysis could be applied to a subjective or discretionary promotion system. 60/ In the other part, Justice O'Connor wrote for a plurality of four Justices and addressed the specific evidentiary standards including the burdens which plaintiff and defendant must bear in a disparate impact case. 61/ Justice Blackmun wrote an opinion, dissenting in part and concurring in part, that expressed disagreement with the plurality's evidentiary standards. 62/

In such a close case, it is important to look at which Justices did not express a view on the evidentiary standards. Justice Stevens wrote an opinion concurring in the judgement but argued that it was premature to discuss the evidentiary standards before the district court had reconsidered the evidence under disparate impact analysis. 63/ Justice Kennedy, took no part in the decision. As we shall see, these two Justices later take major roles in Wards Cove Packing Co. v. Atonio. 64/

In the plurality part of the opinion, Justice O'Connor noted that disparate impact when applied to subjective employment criteria might well create a "Hobson's choice" for employers who might adopt quotas as the only "cost-effective means of avoiding expensive litigation and potentially catastrophic liability . . . ." 65/ In order to avoid these quotas, which she found clearly against Congressional intent, Justice O'Connor said that evidentiary standards should serve as safeguards. 66/ It is these standards that are at the heart of Justice O'Connor's opinion and which sparked Justice Blackmun's

dissent.

Justice O'Connor discussed three basic aspects of a disparate impact case but cautioned that "the ultimate burden of proving discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." 67/ The initial problem of a disparate impact case concerns the type of proof which is necessary to show discrimination. Justice O'Connor found firstly, that the plaintiff must go beyond mere statistical disparities and identify the specific employment practice that is challenged, even if the subjective nature of the practice makes that difficult. 68/ Secondly, she argued that once such a practice has been identified, the plaintiff must offer statistical evidence "of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected class." 69/ Thirdly, she said that the defendant may discredit the statistics or offer alternative statistics which counter the plaintiff's statistics. 70/

The next aspect of a disparate impact case concerns the 'business necessity' or 'job relatedness' defense. Justice O'Connor first quoted the Griggs opinion and then asserted that the employer may show that the employment practice is based on legitimate business reasons but that "such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant." 71/ She said, "[o]n the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." 72/

Justice O'Connor made it clear that the employers are not necessarily required, even when defending standardized tests, to introduce formal predictive validity studies linking the practices to actual job performance. 73/ She elaborated further that some jobs, such as managerial jobs, are based on personal qualities which are not amenable to standardized testing. Further, she admonished that courts must bear in mind that they are less competent than employers to restructure business practices and should do so only when mandated by Congress. 74/

Finally, once the defendant has met its burden of production of legitimate business reasons, Justice O'Connor suggested that the defendant may show that other practices, without an undesirable discriminatory effect, would also serve the employer's 'legitimate interest in efficient and trustworthy workmanship.' 75/

Justice Blackmun, joined by Justices Brennan and Marshall, argued in dissent against the evidentiary standards of the plurality and questioned their approach to subjective standards. First, Justice Blackmun found that if the defendant wishes to use the defense of business necessity, then the defendant must take on a burden of proof and not a burden of mere production. 76/ He said that simply offering a nondiscriminatory justification "is simply not enough to legitimize a practice that has the effect of excluding a protected class from job opportunities at a significantly disproportionate rate." 77/

Secondly, Justice Blackmun was troubled by Justice O'Connor's curious statements about how the employer and not the courts are in the best position to know which employment practice is best. According to Justice Blackmun,

Allowing an employer to escape liability simply by articulating vague, inoffensive

> sounding subjective criteria would disserve Title VII's goal of eradicating discrimination in employment. It would make no sense to establish a general rule whereby an employer could more easily establish business necessity for an employment practice, which left the assessment of a list of general character qualities to the hirer's discretion, than for a practice consisting of the evaluation of various objective criteria carefully tailored to measure relevant job qualifications. Such a rule would encourage employers to abandon attempts to construct selection mechanisms subject to neutral application for the shelter of vague generalities. 78/

The Watson decision hardly provided definitive answers about the burdens under Title VII disparate impact cases. It was a peculiar case with its plurality opinion, strident dissenting opinion, and two crucial members not joining the main plurality or dissenting opinions. It is not surprising then, that the Supreme Court took a case on the same subject in the very next term -- Wards Cove Packing Co. v. Atonio. 79/

Wards Cove

The Wards Cove case involved unskilled and skilled jobs at Alaskan salmon canneries. 80/ The plaintiffs claimed that the cannery jobs were filled primarily by nonwhites -- Filipinos and Alaskan Natives -- and that the non-cannery jobs were predominantly filled by whites. 81/

In a close 5-4 decision, the Court returned to the well furrowed ground of evidentiary requirements in disparate impact analysis. 82/ Unlike Watson, Justices Stevens and Kennedy took important roles in Wards Cove -- Justice Kennedy by joining

the majority and Justice Stevens by writing the major dissenting opinion. 83/

Justice White, writing for the Court addressed two major areas. Firstly, the Court held that a plaintiff must show a disparity between the racial composition of the jobs at issue and the qualified population in the relevant labor market. 84/ Moreover, the Court now seems to require that the plaintiff show that the statistical disparity is the result of one or more of the employment practices and that the plaintiff specifically show that each challenged practice creates a disparate impact on employment opportunities. 85/

Secondly, the Court affirmed the plurality in Watson by holding that once the plaintiff has shown disparate impact discrimination, then the employer may rebut simply by carrying "the burden of producing evidence of a business justification for the employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff." 86/ In defining the burden of production, the Court found that "[a] mere insubstantial justification in this regard will not suffice" but that "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." 87/ As in Watson, the Court also found that if the employer met its burden of production, then the plaintiff could then show that the employer had alternative practices available to achieve the same business ends, 88/ but that these must be equally as effective as the challenged practice and not overly costly to use. 89/

Two dissents were written in Wards Cove -- one by Justice Stevens 90/ and one by Justice Blackmun. 91/ Justice Stevens disagreed with the Court's interpretation of its

own prior decisions in terms of both the defendant's burden of proof in providing a business reason for its practices but also with the value of statistical evidence of disparate impact.

The majority in Wards Cove, said that they were merely interpreting earlier decisions correctly and that they were not overturning previous decisions. 92/ Justice Stevens thought that the Court abandoned the spirit of Title VII 93/ and retreated from previous decisions through judicial activism. 94/

After reviewing the Court's earlier decisions, 95/ Justice Stevens first attacked the Wards Cove Court's finding that the employer's burden of proof in rebuttal was a burden of production and not a burden of persuasion. He examined common law pleading and found that the employers responsibility to show a business necessity should be treated as analogous to an affirmative defense which has traditionally carried a burden of persuasion. 96/

Next, Justice Stevens disagreed with the Court that statistical evidence of racial stratification without linkage to specific employment practices was valueless. 97/ Instead, Justice Stevens found that while evidence of racial stratification "may not by itself suffice to establish a prima facie case of discrimination . . . , such evidence of racial stratification puts the specific employment practices challenged by respondents into perspective." 98/ He would have treated the evidence as a "significant element" in establishing a prima facie case. 99/

Justice Blackmun, in a short but strident dissent, not only fully concurred with Justice Stevens' dissent, 100/ but criticized the Court for going backward in the fight

against racial discrimination. 101/ He found that the Court's ruling not only followed the plurality's mistakes in Watson, but "bars the use of internal workforce comparisons in the making of a prima facie case of discrimination, even where the structure of the industry in question renders any other statistical comparison meaningless. And it requires practice-by-practice statistical proof of causation, even where, as here, such proof would be impossible." 102/

The legal surgeons wielding the Title VII scalpel from Griggs to Wards Cove have had to conduct clinical practice under changing opinions of what are sound surgical procedures. The evidentiary standards at different times have encouraged deep broad cuts and alternatively short shallow incisions. Behind these opinions is the on going debate about how precise the surgery can be using the present instruments and whether the side effects of imprecise surgery would threaten the health of the patient.

III. Title VII and Subjective Professional and Managerial Job Criteria

After 27 years, it is time to assess the value of Title VII in fighting discrimination for professional and upper level jobs. The recent Supreme Court decisions in Watson and Wards Cove punctuate that need.

When Title VII was enacted, the edifice of centuries of racial and gender discrimination were still painfully obvious in many organizations -- one had only to look at overt policies of racial discrimination. Now, after two and a half decades, overt policies of racial and gender based discrimination are less common. 103/ Yet, minorities and women still have not reached parity with men at top professional and

managerial positions. 104/ Top level jobs may seem close, yet the "glass ceiling" keeps them out of reach. 105/

Title VII has significant limitations when attacking discrimination in these upper level professional and managerial jobs. Both the assumptions on which it was based and the recent interpretations by the Court constrict its utility.

The Limits of Organizational Rationality

Underlying Title VII is the assumption that jobs should be based on merit and not on gender or racial discrimination. 106/ Less clearly stated is the assumption that organizations will operate in a rational manner and select people of merit who will help the organization to perform at optimal levels. 107/

Assuming that organizations work in a rational manner when making upper level employment decisions is naive at best. 108/ A recurring theme in modern organizational theory is that organizational actions often are not based solely, or even primarily, on economically rational reasons. 109/ Ironically, the very existence of racial and gender based discrimination is itself an example of organizations acting irrationally by turning good quality potential workers aside simply because of non-rational racial prejudice. If it is assumed that organizations act rationally, it follows that employers would utilize the best workers available, regardless of sex or color, in order to pursue their organizational goals. Obviously, the entire sorry history of racial and gender discrimination shows that organizational employment policies are based on at least some reasons that have little to do with organizations efficiently and effectively pursuing specific economic goals.

Although one can set rational qualifications for simple lower level positions, the

qualifications for upper level professional and managerial jobs are often more vague. This occurs for several reasons. Firstly, there is little agreement as to what managers actually do, even among management professors. 110/ Secondly, managerial jobs are often changing at a rapid pace making one day's specific qualification obsolete. 111/ Finally, many organizations just do not behave in a rational way. 113/

Without a clear idea of exactly what the qualifications are for an upper level professional or managerial position, job criteria naturally tend to be subjective and even vague. Subjectivity and vagueness are the breeding ground for racial or gender discrimination based discrimination because they give room for underlying deep seeded stereotypes to operate. Without a clear idea of what merit is in upper level professional and managerial roles, there is no clear model to replace the discrimination Title VII was designed to eliminate.

The Limits of Validity

Even if the exact nature of upper level professional and managerial work can be determined, the next problem is determining which objective or subjective job criteria validly screen for the specific skills, knowledge, and experience required for a particular upper level professional or managerial job.

The Equal Employment Opportunity Commission has issued guidelines for validity studies on job criteria 114/ and the American Psychological Association argued in an amicus brief in Watson that predictive job validity can be established. 112/ However, neither focused primarily on upper level professional and managerial jobs.

Although it is theoretically possible to validate criteria for all jobs, it becomes a difficult task for upper level professional and managerial jobs. Firstly, as discussed above, there is little agreement as to what is good job performance in these types of jobs. If there is no agreement as to what each job is and no guarantee that the job will not radically change, then there can be no meaningful selection and promotion system based on job performance criteria.

Secondly, even if the requirements of the job are known, the relatively few upper level managerial or professional jobs makes the cost of validation studies conducted by industrial/organizational psychologists extremely expensive because each unique position must be studied and the cost cannot be spread out over many identical jobs.

Finally, since rigid organizational hierarchies are being replaced now and in the future in many organizations by teams and task forces which work on numerous unique projects of limited duration, there will be fewer fixed jobs in hierarchies and more rapidly changing jobs. 115/ In order to keep up with the changes, psychologists would have to do nearly constant updates on their validity studies, thereby driving up costs.

IV. Conclusions

That old Title VII medicine, at once familiar and comforting, is not equipped to cure racial and gender discrimination in the workforce of the 1990s and the next century. Not only has the disease built up a resistance to the therapy through increasing employer sophistication about Title VII liability, 117/ the Supreme Court has reduced the aggressiveness of the treatment through increasingly more difficult evidentiary burdens for the plaintiff and easier burdens for the defendant.

The Supreme Court decisions in Watson and Wards Cove mean that even though subjective employment decisions can be examined under a disparate impact theory, the burden of proof for the plaintiff is so heavy and the burden of production for the defendant so light that, despite generous discovery, 118/ it will be difficult for a plaintiff to attack practices concerning upper level professional and managerial jobs. 119/

Congress has been active in the last two years debating legislation that can fairly be characterized as attempts to patch or shore up Title VII after the Supreme Court decisions. In 1990, President Bush vetoed a civil rights bill that he characterized as a "quota" bill. 120/ In 1991, Congress is again active in trying to develop legislation that less likely to be labeled as a quota bill. 121/ The debate has become mired in the hackneyed pattern of the detractors insisting that the legislation is a quota bill and proponents insisting that it is not a quota bill. 122/

None of the recent bills comes to grips with the fundamental question of whether organizations always run as rational meritocracies, especially at upper level professional and managerial levels. If legislation is based on this questionable assumption, real reform is uncertain at best. It is time for a fundamental reexamination of the ways that we attempt to achieve equality in the work place.

V. Notes

1/ 42 U.S.C. secs. 2000e to 2000e-17 (1982).

2/ Id. The Act also proscribes discrimination on the basis of color, religion or national origin. The provision on sex was added as a floor amendment in a curious but unsuccessful attempt to make the bill so undesirable that it would be defeated.

3/ See Blumrosen, The law Transmission System and the Southern Jurisprudence of Employment Discrimination, 6 Indus. Rel. L.J. 313 (1984); See also E. Norton, Minority Workers of Tomorrow Must Tread a Much Different Path Than Did Today's Middle Class, in Work in the 21st Century (1984).

4/ Watson v. Fort Worth Bank & Trust, 108 S.Ct. 2777, 2787 (1988) ("Opinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve close cooperation with one's co-workers or complex and subtle tasks like the provision of professional services or personal counseling").

5/ Id.

6/ Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989).

7/ E.g., Equal Pay Act, 29 U.S.C. sec. 206(d); Age Discrimination in Employment Act, 29 U.S.C. sec. 621; Rehabilitation Act, 29 U.S.C. sec. 791; Fair Labor Standards Act, 29 U.S.C. sec. 201 et. seq.

8/ See W. Heisler & J. Houck, A Matter of Dignity: Inquiries Into the Humanization of Work (1977); See also D. Ewing, Freedom Inside the Organization (1977); See also W. Scott & D. Hart, Organizational America (1979); See also W. Whyte, The Organizational Man (1956).

10/ Title VII of the 1964 Civil Rights Act also covers color, religion, and national origin. For the purposes of this paper color and national origin will be included in the phrase racial discrimination. Gender discrimination is used to mean discrimination because of sex. Religion will not be discussed in this paper. See 42 U.S.C. sec. 2000e-2 (a).

11/ In several places Congress specifically refused to block, if not embraced, the concept that organizations could be run as meritocracies. First, Congress proscribed discrimination against all races and specifically included a provision protecting whites or other majorities against discrimination. See 42 U.S.C. sec. 2000e (j); See also McDonald v. Santa Fe Trail Transportation Co., 411 U.S. 792 (1973)(discipline for theft must not give preference to a black worker over a white worker); But see United Steelworkers of America v. Weber, 443 U.S. 193 (1979)(voluntary affirmative action programs within the spirit of Title VII are usually acceptable). Secondly, Congress specifically refused to curb merit systems, quality or quantity of production systems, or ability tests. See 42 U.S.C. sec. 2000e-2 (h).

12/ There is still a concern with racial minorities and women that despite success in their early careers, that they are excluded from the white male dominated top levels. For example, women have trouble "penetrating the so-called glass ceiling, a bias barrier that keeps so many women from moving beyond middle management. Among Fortune 500 companies, less than 2% of top executives are female." See Wallis, Onward, Women! Time, December 4, 1989, at 85; See also Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947 (1982).

13/ See Watson, 108 S.Ct. 2777 (1988).

14/ "In 1989 it is a rare employer who will admit racial or gender related prejudice, even privately." Holdeman, Watson v. Fort Worth Bank & Trust: The Changing Face of Disparate Impact, 66 Den. U.L. Rev. 179, 179 (1989).

15/ Minorities and women are under represented in upper level professional and managerial jobs, especially at the top positions. See Bartholet, supra note 12.

16/ Watson, 108 S.Ct. at 2791 ("It is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing.").

17/ See Blumrosen, The Legacy of Griggs: Social Progress and Subjective Judgements, 63 Chi.-Kent L. Rev. 17 (1987). Blumrosen argues that not only Griggs but the changing nature of modern organizations in the late 20th century accounts for a greater reliance on subjective methods in employment decisions.

18/ The costs of providing professionally conducted validity studies might be prohibitively expensive or impractical if the cost cannot be spread over a large number of nearly identical jobs or if the subjective criteria used cannot be easily measured by conventional methods. See, e.g., Watson, 108 S.Ct. at 2787, 2791.

19/ See id. at 2787 (employers seek to avoid "potentially catastrophic liability).

20/ The House Committee on Education and Labor in drafting what would become Title VII was specifically concerned that minorities were being hindered from reaching higher level positions and excluded from rapidly growing white collar industries. See H.R. Rep. No 570, 88th Cong., 1st Sess. (1963); For an excellent and

insightful analysis of legislative history of Title VII see also Rose, Subjective Employment Practices: Does Discriminatory Impact Analysis Apply? 25 San Diego L. Rev. 63 (1988).

21/ The legislation was intended to create a "national policy on equal employment opportunity, predicated on individual merit, competence, and capability." H.R. Rep. 570, supra note 20; See also, 42 U.S.C. sec. 2000e-2c (j); See also 42 U.S.C. sec. 2000e-2 (h).

22/ See Bartholet, supra note 12.

23/ See Rose, supra note 20.

24/ Id.

25/ 411 U.S. 792 (1973).

26/ Id.

27/ 450 U.S. 248 (1981).

28/ Id. at 254.

29/ Id. at 256.

30/ See Holdeman at 101, supra note 14.

31/ See Holdeman at 101, supra note 14.

32/ 401 U.S. 424 (1971).

33/ Id. at 427.

34/ Id. at 427-428.

35/ Id.

36/ Justice Brennan took no part in the decision.

37/ Id. at 426.

38/ Id. at 430.

39/ Id. at 431.

40/ 42 U.S.C. sec. 2000e-2 (h).

41/ Griggs, 401 U.S. at 436 (Justice Burger discussed the history of he first Tower amendment which endorsed nearly unrestrained employment testing and was defeated comparing it with the second Tower amendment which was passed two days later and became 703 (h).

42/ Id. at 432; The possibility for confusion on evidentiary standards can be seen by comparing the definitions of two words in Justice Burger's phrase -- show and manifest. Show means "[t]o make apparent or clear by evidence, to prove." while manifest means "[e]vident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident. In evidence, that which is clear and requires no proof; that which is notorious." Black's Law Dictionary at 1237, 867 (5th ed. 1979).

43/ Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

44/ Id. at 427.

45/ Id. at 425.

46/ Id. at 425.

47/ Id. at 425 ("we are concerned only with the question of whether Albemarle has shown its test to be job related").

48/ Id. at 430-431.

49/ Id. at 431; The EEOC developed Uniform Guidelines on Employee Selection Procedures in 1978. The Court was using a similar, but previous, version of the guidelines. See 29 C.F.R. 1607 (1988).

50/ Albemarle, 422 U.S. at 431-432.

51/ Id. at 432-433.

52/ Id. at 433-434.

53/ Id. at 435.

54/ Id. at 452 (Burger, C.J. dissenting in part and concurring in part).

55/ Id. at 449 (Blackmun, J. concurring in the judgement).

56/ Griggs, 401 U.S. 424; Albemarle, 422 U.S. 405.

57/ Watson, 108 S.Ct. at 2783.

58/ Id. at 2786

59/ Justice O'Connor delivered the opinion of the Court in Parts I, II-A, II-B, and III; and was joined by only Chief Justice Rehnquist, Justice White, and Justice Scalia on Parts II-C and II-D.

60 Watson, 108 S.Ct. 2777.

62/ Id.

63/ Id. at 2797.

64/ 109 S.Ct. 2115.

65/ Watson, 108 S.Ct. 2788.

66/ Id. at 2788.

67/ Id. at 2790.

68/ Id. at 2788 ("Although this has been relatively easy to do in challenges to standardized tests, it may sometimes be more difficult when subjective selection criteria are at issue.")

69/ Id. at 2788-2789 (Although, some lower courts have required that minorities or women be selected at 4/5ths the rate while others have used the statistical concept of standard deviation to show discrimination, Justice O'Connor ruled that no general standard need be used and that the cases should be decided on a case by case basis.)

70/ Id. at 2789.

71/ Id. at 2790.

72/ Id. at 2790.

73/ Id. at 2790-2791.

74/ Id. at 2791.

75/ Id. at 2790.

76/ Id. at 2792.

77/ Id. at 2794.

78/ Id. at 2797.

79/ Wards Cove, 109 S.Ct. 2115.

80/ Id. at 2119.

81/ Id. at 2119-2120.

82/ Id. (Justices Stevens, Brennan, Blackmun, and Marshall were in the minority.).

83/ Id. at 2127 (Stevens, J. dissenting)

84/ Id. at 2122.

85/ Id. at 2124.

86/ Id. at 2126.

87/ Id. at 2126.

88/ Id. at 2125.

89/ Id. at 2127.

90/ Id. at 2127 (Joined by Justices Brennan, Marshall and Blackmun).

91/ Id. at 2136 (Joined by Brennan and Marshall).

92/ Id. at 2126 ("We acknowledge that some of our earlier decisions can be read as suggesting otherwise . . . . But to the extent that those cases speak of an employer's 'burden of proof' with respect to a legitimate business justification defense . . . they should have been understood to mean an employer's production -- but not persuasion -- burden.").

93/ Id. at 2127, 2132 ("[T]he Court retreats." "I am astonished to read . . . [t]his casual -- almost summary -- rejection of statutory construction that developed in the wake of Griggs is most disturbing.").

94/ See Id. at 2127-2128 ("I cannot join this latest sojourn into judicial activism.").

95/ Id. at 2128-2131.

96/ Id. at 2131-2132.

97/ Id. at 2133-2136.

98/ Id. at 2135.

99/ Id. at 2136.

100/ Id. at 2136

101/ Id. at 2136 ("The majority's legal rulings essentially immunize [old fashioned plantation style practices] from attack under Title VII disparate-impact analysis. Sadly, this comes as no surprise. One wonders whether the majority still believes that race discrimination -- or more accurately, race discrimination against non-whites -- is a problem in our society, or even remembers that it ever was.").

102/ Id. at 2136.

103/ See Holdeman, supra note 14; But see Wards Cove, 109 S.Ct. at 2136 (Blackmun, J. dissenting).

104/ See Bartholet, supra note 12; See also Wallis, supra note 12.

105/ See Wallis, supra note 12.

106/ See note 11.

107/ In organizational theory, rationality means that organizational decisions are made in furtherance of clearly established over arching organizational goals. See H. Simon & J. March, Organizations (1958).

108/ The relationships between upper level leaders and others in organizations are highly complex and manifest themselves in non-obvious ways. See M. Kets de Vries, Prisoners of Leadership (1989).

109/ See G. Morgan, Images of Organization (1987); See also K. Weick, The Social Psychology of Organizing (1979); See also Karmel, Leadership: A Challenge to

Traditional Research Methods and Assumptions, 3 Academy of Management Review 475 (1978).

110/ See, e.g., H. Mintzberg, The Nature of Managerial Work (1973); J. Kotter, The General Managers (1973); F. Luthans, R. Hodgetts & S. Rosenkrantz, Real Managers (1988).

111/ See G. Lodge, Educators Must Advocate Holism to Prepare Our Human Resources for the Coming Decentralization, in Work in the 21st Century (1984).

112/ See M. Cohen, G. March & J. Olsen, A Garbage Can Model of Organizational Choice, 17 Administrative Science Quarterly 1 (1972); See also R. Cyert & J. March, A Behavioral Theory of the Firm (1963).

113/ As strange as it may seem, studies based on our conventional understanding of leadership have failed to find a link between good upper level leadership and overall organizational performance. See Pfeffer, The Ambiguity of Leadership, 2 Academy of Management Review 104 (1977).

114/ See 29 C.F.R. 1607 (1988).

115/ For an excellent discussion of the amicus briefs, see Rose, supra note 20.

116/ See G. Klaus, Corporate Pyramids Will Tumble When Horizontal Organizations Become the New Global Standard, in Work in the 21st Century (1984); See also Blumrosen, supra note 17.

117/ See Holdeman, supra note 14.

118/ See Wards Cove, 109 S.Ct. at 2125 ("liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims").

119/ See Holdeman at 203, supra note 14; See also Rose at 93, supra note 20.

120/ See Wash. Post, Oct. 23, 1990, at A1, col. 3.; See also Edsall, President's Veto is Double-Edged Sword in Testy Political Climate, Wash. Post, Oct. 23, 1990, at A12, col. 1.

121/ See Wash. Post, May 22, 1991, at A5, col. 1.

122/ Id.